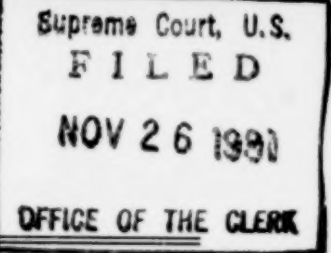


No. 90-8466



In The
Supreme Court of the United States
October Term, 1991

DAVID E. RIGGINS,

Petitioner,

v.

STATE OF NEVADA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Nevada

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the forcible administration of anti-psychotic drugs to an insanity defendant¹ during trial violates the defendant's rights under the Due Process Clause of the Fourteenth Amendment.

2. Whether the forcible administration of anti-psychotic drugs to an insanity defendant in a capital case violates the defendant's Eighth Amendment right not to be subjected to cruel and unusual punishment.

¹ In this brief, "insanity defendant" refers to a criminal defendant whose primary defense is that he was legally insane at the time of the crime.

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OPINIONS BELOW

The opinion of the Supreme Court of Nevada is reported at 808 P.2d 535 (Nev. 1991), and reproduced in the Joint Appendix ("J.A.") at 52-69. The Nevada District Court's order denying petitioner's motion to terminate the administration of medication is reproduced at J.A. 49.

JURISDICTION

The judgment of the Supreme Court of Nevada was entered on March 28, 1991. A motion to stay remittitur pending a Writ of Certiorari was granted by the Supreme Court of Nevada on April 15, 1991.

On June 13, 1991, petitioner filed a Petition for Writ of Certiorari, which was granted by this Court on October 7, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself."

2. The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

3. The Eighth Amendment to the United States Constitution provides in relevant part: "[C]ruel and unusual punishments [shall not be] inflicted."

4. The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner David E. Riggins is presently under sentence of death after he was so heavily drugged by the State of Nevada that he appeared like a zombie throughout his trial. Despite Riggins' objection while competent to receiving medication during his trial, and despite substantial evidence that Riggins would have been competent to stand trial without medication, the State of Nevada forced Riggins to ingest extremely high dosages of the antipsychotic drug Mellaril each day of his trial. The medication sedated Riggins; it made him appear apathetic, uncaring, and without remorse. Riggins was therefore prevented from presenting the best evidence he had – his unmedicated demeanor – to support his only defense – that he was legally insane at the time of the crime.¹

¹ The trial court instructed the jury that, under Nevada law, to establish an insanity defense, the defendant must prove

(Continued on following page)

The Court denied Riggins' motion to discontinue the medication, but it made no finding (1) that Riggins would have been incompetent without the medication; (2) that Riggins suffered from a mental disorder that was appropriately treated with Mellaril; or (3) that Riggins would present a danger to himself or others without medication.

Riggins was arrested on November 21, 1987, in connection with the death of Paul Wade. Soon after his arrest, he was examined by Dr. Edward Quass, a prison psychiatrist, because he had complained that he was hearing voices and having trouble sleeping. (R. 440). Riggins suffers from paranoid schizophrenia (J.A. 3-5, 11-12; R. 747-48), a psychosis characterized by "a disorder in the thinking processes, such as delusions and hallucinations." particularly "delusions of persecution." *Stedman's Medical Dictionary* 1261 (5th ed. 1982). Without medication he appears emotionally disturbed, exhibits "a considerable degree of nervous[ness]" (R. 460), is "delusional," "paranoid" and "very agitated" (J.A. 3-5) and experiences auditory hallucinations (R. 440).

Despite these symptoms, Dr. Quass believed Riggins was competent without medication. Nevertheless, he

(Continued from previous page)

by a preponderance of the evidence that, at the time of the crime, "he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." (R. 853)

prescribed the antipsychotic drug Mellaril² because Riggins "said that he had been on Mellaril in the past and it had worked for him." (R. 440-41). Dr. Quass started Riggins on a regimen of 25 milligrams of Mellaril, 4 times a day.

On January 13, 1988, Riggins moved to suspend his trial until it was determined whether he was competent to stand trial. (J.A. 6). By this time, his Mellaril prescription had been increased to 450 milligrams a day. (R. 91, 405, 465, 480). He was ultimately examined by three court-appointed psychiatrists. Two, Drs. Franklin D. Master and William D. O'Gorman, found the medicated Riggins competent to stand trial. (J.A. 7-10 (Master)); (R. 475, 488-89 (O'Gorman)). The third psychiatrist, Dr. Jack A. Jurasky, found the medicated Riggins incompetent. (J.A. 11-12). The trial court did not hold a competency hearing and, based solely on the psychiatrists' reports, found Riggins competent to stand trial. (J.A. 13-14).

On June 10, 1988, Riggins filed notice of his insanity defense (J.A. 25) and also moved to terminate the administration of Mellaril on the ground that continued medication would deprive him of his right to present a defense. (J.A. 20-24; R. 52-56). By then, Riggins' prescription for Mellaril had been increased again, this time to 800 milligrams a day, eight times the dosage of the original prescription. (R. 441-42). The State opposed this motion,

² Mellaril is the product name for the antipsychotic drug thioridazine, which is commonly used in the treatment of acute and chronic schizophrenia. *The Physician's Desk Reference* 1950-52 (45th ed. 1991); *Merck Manual* 2486 (15th ed. 1987).

arguing that the medication was "essential for him in order for him to maintain his competence." (J.A. 32).

The trial court held a hearing on Riggins' motion the following month, at which Drs. Quass, Master and O'Gorman testified. Dr. Quass testified that Riggins would be competent to stand trial without any medication. (R. 443). Dr. Master testified that, while "[i]t is a possibility" that Riggins would become incompetent if the medication were stopped, there was no real "likelihood" of this happening (R. 414): "My guess is that taking [Riggins] off of medication would have no noticeable effect." (R. 411-12). Finally, Dr. O'Gorman testified that he had examined Riggins, without medication, in 1982 and that he had been competent at that time. (R. 475). Dr. O'Gorman said that he could not, however, render an opinion whether Riggins would become incompetent without medication, because he had not recently evaluated Riggins in an unmedicated condition. (R. 485). Thus, none of the psychiatrists testified that Riggins would likely become incompetent if the medication were discontinued. To the contrary, the only psychiatrist who had recently examined Riggins without medication – Dr. Quass – concluded that he was competent without medication.

While the trial judge acknowledged that it was merely a possibility that Riggins would become incompetent without medication (R. 502), he expressed concern about how long it would take "to bring back [Riggins'] competency to stand – continue with the trial" in the event he did become incompetent. (R. 417-18). But the trial, at that time, was still four months away, and the psychiatrists opined that, if Riggins' medication was stopped, it would take only ten days to four weeks to see

whether he was incompetent without medication (R. 419, 500), and, if he was, perhaps only several weeks of medication to restore his competency. (R. 418). Nonetheless, the trial judge rejected defense counsel's request to stop Riggins' medication in order to have him reevaluated for competency while unmedicated. (R. 500). Instead, the judge issued a one-page order that contained no findings of fact – let alone a finding that Riggins would become incompetent without medication – and denied Riggins' motion. (R. 108).³

Accordingly, Riggins was forced to ingest 800 milligrams of Mellaril each day of his trial, a dosage every psychiatrist considered excessive. Dr. Jurasky, who did not testify at the hearing but did testify at trial, described this dosage as enough to "tranquilize an elephant" (R. 752); Dr. Master considered it "just about the maximum amount of Mellaril that can be given before you get into a toxic range" (R. 415); and Dr. O'Gorman remarked that even 450 milligrams of Mellaril a day was "an extremely high dose" for Riggins (R. 473). It was no surprise, therefore, that Riggins was seen closing his eyes during the hearing on his motion to terminate the medication (R. 429-30) and had a zombie-like appearance throughout his trial.

Riggins' sole defense was insanity, and he took the stand to prove this. He testified about hearing the voices

³ The court's order did not indicate whether the judge considered Dr. Jurasky's reports. Dr. Jurasky concluded, based on interviews with Riggins on February 9, 1988 and June 6, 1988, that Riggins was incompetent to stand trial even while receiving medication. (J.A. 11-12, 18-19).

of "Satan and his assistant" who would order him to do certain things, such as hurt or kill people (R. 712-13); he described how, ten months before his arrest, he had been hospitalized after wandering on the streets in his underwear declaring that he was the son of John F. Kennedy and Marilyn Monroe and was sought by the Mafia (R. 739, J.A. 3); he said that Wade (the decedent) had once told him that he had killed two girls and wanted to kill Riggins before Riggins told the police (R. 719); he testified that Wade had tried to kill him by putting fiberglass in his water and by squirting AIDS-infected blood on his cocaine (Wade had supplied Riggins with drugs) (R. 716-17, 723, 741); he said that the voices of Satan and his assistant told him that killing Wade would be justifiable homicide (R. 723); and he explained that he killed Wade only after Wade attacked him with a knife (R. 719). Rather than presenting this bizarre testimony in the unmedicated condition he was in at the time of the offense (R. 740), the "synthetically sane" Riggins appeared rational, cool and unemotional. His testimony, therefore, did not sound truthful and obviously had no impact.

The State exploited Riggins' drug-induced demeanor during his trial, and in so doing, directly contradicted its pre-trial representations to the court. (R. 508-10). Before trial, the State had argued that Riggins needed to be heavily medicated because he was mentally ill, heard voices and would otherwise be incompetent to stand trial. (R. 451, 497). During the trial, however, it used its witnesses to paint an entirely different picture. Dr. Quass testified that Riggins was "rational and coherent" (R. 783, 879); Dr. O'Gorman testified that Riggins exaggerated the fact that he was hearing voices (R. 806, 880); and Dr.

Master testified that he "did not believe that [Riggins] had mental illness" (R. 828). The credibility of this testimony was buttressed by the fact that Riggins appeared perfectly sane at trial. The prosecutor then used his closing argument to focus the jury on Riggins' demeanor: "Does Riggins express sorrow, no. Does he express remorse, no." (R. 864).

The compelled medication also seriously prejudiced Riggins' efforts to present a defense during the penalty phase of the trial. Both mitigating factors that he sought to establish – (1) that he was "under the influence of extreme mental or emotional disturbance" at the time of the crime (R. 935-37), and (2) that he felt remorse for killing Wade – were undermined by the effects of the Mellaril. Rather than looking like the emotionally disturbed individual that he is, the heavily sedated Riggins sat calmly and impassively through the sentencing hearing. Although he wanted to express the grief and sorrow he felt for killing Wade, the medication prevented him from doing so, and, in fact, prevented him from reading a statement he had prepared expressing these sentiments. (R. 951-52).

As a direct result of the medication's effect on his defense, Riggins was convicted of capital murder on November 15, 1988, and sentenced to death on November 17, 1988. He appealed his conviction and sentence to the Supreme Court of Nevada, which specifically rejected his argument that involuntary medication during trial deprived him of his right to present his insanity defense. (J.A. 54).

In a concurring opinion, however, Justice Rose wrote that, in light of the psychiatrists' testimony, the trial court should have permitted Riggins "to terminate the massive dosage of Mellaril prior to trial to determine if he could function without the drug." (J.A. 59).

In dissent, Justice Springer recognized that an insanity defendant's most reliable and potent evidence is his "natural, undrugged, state" (J.A. 66-68), and stated that antipsychotic drugs not only deprive the defendant of this evidence, but make him appear "perfectly sane" while also rendering him "mentally and emotionally inert." (J.A. 61-62). He, therefore, concluded that, under this Court's precedents, the forced medication deprived Riggins of various constitutional rights, including the right to defend himself and present evidence of his true mental state at the time of the offense. (J.A. 64-69).

Petitioner requests that this Court reverse his conviction and sentence.

SUMMARY OF ARGUMENT

A criminal defendant has the fundamental right to testify in his own defense and to present evidence favorable to his defense. When the sole issue at trial is whether the defendant was legally insane at the time of the crime, his most compelling evidence is his natural demeanor. Forcing a mentally ill insanity defendant to ingest antipsychotic drugs during his trial, thereby suppressing his psychotic symptoms and making him appear sane, violates his right to testify and present a defense. Forcibly medicating an insanity defendant with antipsychotic

drugs also violates his Fifth Amendment rights by coercing him to present demeanor evidence that undercuts his defense and makes him appear apathetic and without remorse.

The State asserted no compelling interest to justify infringing these fundamental rights. Even if the State's interest in bringing Riggins to trial while competent would be sufficiently compelling to outweigh these rights, there was essentially no evidence that forcing Riggins to ingest 800 milligrams of Mellaril each day of his trial was necessary to maintain his competence. Moreover, the trial court had the alternative of stopping Riggins' medication to see if he would have become incompetent, but never tried this.

Although the evidence suggested that Riggins would have remained competent without medication, even if he would have become incompetent, he had the right, while competent, to waive his right to be tried while competent.

Forcibly medicating Riggins also infringed his fundamental right to refuse medical treatment, and the State advanced no interest substantial enough to justify infringing this right. Even if the State's interest in ensuring that a defendant is competent for trial is significant enough to outweigh this right, the State failed to prove by clear and convincing evidence – or, for that matter, even a preponderance of the evidence – that drugging Riggins was necessary to maintain his competency.

The compelled medication also violated Riggins' Eighth Amendment right to a fair sentencing determination. A defendant in the sentencing phase of a capital case has the right to present, and have the jury consider, any

relevant mitigating evidence. Forcing Riggins to appear at his trial under the influence of antipsychotic drugs prevented him from presenting his most compelling mitigating evidence – that he suffers from a serious mental illness and that he felt remorse for killing Wade.

ARGUMENT

I.

COMPELLED MEDICATION VIOLATED PETITIONER'S RIGHT TO PRESENT A DEFENSE AND HIS RIGHT AGAINST SELF-INCRIMINATION

A. Compelled Medication Violated Riggins' Right to Present A Defense

A criminal defendant's fundamental right to be heard in his own defense is guaranteed by the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment and is a corollary to the Fifth Amendment's guarantee that no person in a criminal case can be compelled to be a witness against himself. *Rock v. Arkansas*, 483 U.S. 44 (1987). The accused's right to present his own version of the facts "is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Id.* at 51 (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)); accord *Washington v. Texas*, 388 U.S. 14, 19 (1967).

When insanity is at issue, a defendant's right to be heard in his own defense involves more than testimony from the witness stand; the defendant's courtroom demeanor will necessarily have significant probative

value to the jury. See *Pate v. Robinson*, 383 U.S. 375, 385-86 (1966). Indeed, his own demeanor is perhaps the most persuasive evidence an insanity defendant can offer about his mental state at the time of the crime. When an insanity defendant takes the stand, as Riggins did, this is surely of paramount importance.

When an insanity defense is raised, the jury is likely to assess testimony concerning the defendant's mental state at the time of the crime with reference to his courtroom demeanor. *Commonwealth v. Louraine*, 453 N.E.2d 437, 442 (Mass. 1983); see also 4 *Wigmore on Evidence* § 1160 (rev. ed. 1972) ("it seems to be universally accepted that in whatever form the issue of insanity may be presented, the jury may take into consideration the behavior of the person as observed by them"). Indeed, in this case, the trial court instructed the jury to consider Riggins' "manner upon the stand" when assessing the credibility of his insanity defense. (R. 858). It is likely, therefore, that Riggins' calm and controlled demeanor at trial made the jury discount evidence that suggested he was insane at the time of the crime.

This Court has repeatedly held that depriving a defendant of the opportunity to present a defense violates the defendant's right to due process of law. In *Webb v. Texas*, 409 U.S. 95, 97-98 (1972), for example, the Court found that a trial judge's lecture to a defense witness about the consequences of perjury, causing that witness not to testify, violated the defendant's right to present his defense. Similarly, in *Ake v. Oklahoma*, 470 U.S. 68, 86-87 (1985), the Court held that a State's refusal to provide an indigent insanity defendant with the assistance of a psychiatrist to explore the merits of an insanity defense

violated his right to present a defense. See also *Brooks v. Tennessee*, 406 U.S. 605 (1972) (holding that a statute requiring a defendant desiring to testify to do so before any other defense witness testified violated the defendant's right to present his defense).

Moreover, it is well established that due process does not permit a State to suppress "evidence favorable to the accused . . . where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Antipsychotic drugs work just for such a deprivation.

Antipsychotic drugs suppress psychotic symptoms; they make a mentally disturbed person appear calm, competent and sane. They also suppress a person's emotions, causing him to appear listless and apathetic. Antipsychotic drugs therefore undercut an effective insanity defense by misleading the jury as to the defendant's probable mental state at the time of the crime. See generally Fentiman, *Whose Right Is It Anyway?: Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Defendant*, 40 U. Miami L. Rev. 1109 (1986); Note, *Antipsychotic Drugs and Fitness to Stand Trial: The Right of the Unfit Accused to Refuse Treatment*, 52 U. Chi. L. Rev. 773 (1985).

By drugging Riggins into an artificial sanity, the State deprived him of the opportunity to present hard evidence of his true mental condition. Rather than seeing Riggins as the extremely disturbed and irrational individual that he is (see, e.g., J.A. 3-5; R. 494-95), the jury saw him as unemotional, indifferent, and remorseless, unmoved by trial testimony relating to the terrible acts he was accused

of committing. The Mellaril also defeated the purpose of Riggins taking the witness stand. His calm and impassive demeanor contradicted his bizarre testimony. Exposed only to a defendant who appeared sane during his trial – even while testifying – it was no surprise that the jury inferred that Riggins must have been sane at the time of the offense.

In short, by forcing Riggins to take antipsychotic drugs throughout his trial, the State effectively denied Riggins the opportunity, and therefore the right, to present his defense.⁴

In *Ake*, the Court emphasized that truth is the paramount goal of the adversary system. It found that a criminal trial is fundamentally unfair if the State is able to maintain "a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." *Ake*, 470 U.S. at 79. Truth was clearly suppressed in Riggins' trial. Neither the court-appointed psychiatrists who testified about Riggins' mental state at the time of the crime nor the jury ever saw Riggins in an unmedicated condition, as he was at the time of the crime. Compelling Riggins to appear sane at trial gave the State "a strategic advantage" that made the verdict unreliable. Indeed, depriving Riggins of the ability to offer evidence of his insanity through his demeanor

⁴ Numerous state courts have so held. See *Commonwealth v. Louraine*, 453 N.E.2d 437, 442 (Mass. 1983); *State v. Hayes*, 389 A.2d 1379, 1381-82 (N.H. 1978); *In re Pray*, 336 A.2d 174, 176-77 (Vt. 1975); *State v. Maryott*, 492 P.2d 239, 242-44 (Wash. App. 1971).

was even more unfair than the deprivation of the assistance of a psychiatrist in *Ake*, because Riggins' evidence of insanity would have come directly from himself rather than through the filter of an outside observer. As Justice Springer recognized in his dissent below, "[n]o testimony of psychiatrists, psychologists, social workers, friends or family can approach the insight a jury is afforded by the opportunity to see and hear the defendant, *as is*. (J.A. 67 (emphasis in original)). A "live" demonstration of a defendant's mental condition is much more persuasive than the cold presentation of expert testimony.

In *Rock v. Arkansas*, 483 U.S. 44, 52 (1987), this Court reaffirmed that "an accused's right to present his own version of events in his own words" is fundamental. The Court explained that the source of this right is not only the Due Process Clause of the Fourteenth Amendment, but the Compulsory Process Clause of the Sixth Amendment, which applies to the States through the Fourteenth Amendment. *Id.*; see also *Washington v. Texas*, 388 U.S. 14, 17-19 (1967). The Compulsory Process Clause guarantees to a defendant the "fundamental" right to call "witnesses in his favor." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Logically included in this right is a defendant's right to testify himself, if he should decide that it is in his interest to do so. "In fact, the most important witness for the defense in many criminal cases is the defendant himself." *Rock*, 483 U.S. at 52. This certainly was true in Riggins' case: except for Dr. Jurasky, Riggins was the only defense witness.

In *Rock*, the Court found that a statute prohibiting a defendant from offering his hypnotically-refreshed testimony unconstitutionally restricted the defendant's right

to testify. Although the statute did not prevent the defendant from taking the witness stand, it "exclude[d] material portions of his testimony." *Id.* at 55. Here, although Riggins was able to take the stand, he was prevented from offering "material portions" of his testimony: his natural demeanor and his unmedicated thought processes. Nothing could have been more unfair to Riggins. His only defense depended on this evidence and its exclusion violated his rights to due process and compulsory process.

B. Compelled Medication Infringed Riggins' Fifth Amendment Right Against Self-Incrimination

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." This right against self-incrimination reflects our criminal justice system's fundamental values, such as "requiring the government, in its contest with the individual to shoulder the entire load." *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). The government is constitutionally required to establish guilt "by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

Compulsory medication violates an insanity defendant's Fifth Amendment rights in at least two ways: first, it makes it easier for the States to rebut the evidence proffered by the defendant on the question of his sanity, thereby undermining the requirement that the State "shoulder the entire load"; second, it forces the defendant

to effectively present evidence against himself by compelling him to appear unremorseful, apathetic and sane.

When Riggins took the stand in his own defense he was compelled to present the demeanor and thought processes of a sane person. He was compelled to appear indifferent, rational and unemotional. He thus became an instrument of his own conviction. Indeed, in violation of a pre-trial order (R. 508-10), the prosecutor used Riggins' demeanor at trial to challenge his veracity and to inflame the jury: "Mr. Riggins claims to hear voices. It's funny that his roommates never new that. He never told his roommate about those funny voices. . . . And does Riggins express sorrow, no. Does he express remorse, no. Is Riggins crazy, no." (R. 864). This prejudicial argument was further exacerbated by the court's instruction to the jury that "[t]he credibility of a witness shall be determined by his manner upon the stand." (R. 858).⁵

It was particularly unfair for the State to argue, as it did during the trial, that Riggins was not mentally ill (R. 828) and that he had fabricated his testimony about hearing voices. (R. 806, 822, 864, 880). The State had, of course, argued to the contrary before the trial when insisting that Riggins be medicated. (R. 451, 497). The State's trial strategy was akin to obtaining a conviction through the use of false evidence, something the Court has long condemned as violating the Due Process Clause of the Fourteenth Amendment, even if the false evidence goes only to the credibility of a witness. *See, e.g., Napue v.*

⁵ The trial court did not instruct the jury concerning how the Mellaril affected Riggins' demeanor and thought processes.

Illinois, 360 U.S. 264 (1959). The State's tactics were analogous to forcing a brown-haired defendant to dye his hair blond in order to fit an eyewitness description of the perpetrator.

Forcibly medicating Riggins therefore gave the State two "strategic advantages" that "cast a pall on the accuracy of the verdict obtained": the State was able to suppress evidence favorable to Riggins' defense while compelling him to present evidence prejudicial to that defense.

C. No Compelling State Interest Justified the Involuntary Medication of Riggins

Admittedly, the right to testify in one's own defense is not absolute; nonetheless, it would take a compelling state interest to justify infringing this fundamental right. See, e.g., *Duren v. Missouri*, 439 U.S. 357, 367-68 (1979) (a "significant State interest" is necessary to justify infringing a defendant's right to a jury trial from a fair cross-section of the community, and that "significant State interest [must] be manifestly and primarily advanced" by the State regulation that results in an unfair cross-section); cf. *Kramer v. Union School Dist. No. 15*, 395 U.S. 621, 627 (1969) (when a statute denies certain persons the right to vote, "the Court must determine whether the exclusions are necessary to promote a compelling State interest"); *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976) ("a significant impairment of First Amendment rights must survive exacting scrutiny"; "the interest advanced [by the State] must be paramount, one of vital importance"). There was no compelling State interest in this case. While

the State of Nevada has an interest in bringing to trial defendants accused of violating its laws and it may not subject an incompetent person to trial⁶ – at least if the person has not waived his right to be tried while competent⁷ – neither of those interests was implicated here.

Moreover, the State also has an interest in obtaining accurate verdicts in criminal cases, an interest that is undermined when a jury receives false information about the defendant's mental state, especially when that is the sole issue at trial. See *United States v. Charters*, 829 F.2d 479, 493-94 (4th Cir. 1987) ("the real government interest at issue here is not simply an interest in trying an accused; rather, the government's interest is in a fair trial in which the accused's guilt or innocence is correctly determined"), modified on rehearing, 863 F.2d 302 (4th Cir. 1988), cert. denied, 110 S. Ct. 1317 (1990). Thus, it is doubtful that a State's interest in making a defendant competent to stand trial can ever be so "compelling" where to do so requires medicating an insanity defendant with drugs that undermine his defense. See *Bee v. Greaves*, 744 F.2d 1387, 1395 (10th Cir. 1984), cert. denied, 469 U.S. 1214 (1985).

Even if such an interest could be termed "compelling," there was little evidence in this case that forcing

⁶ See *Pate v. Robinson*, 383 U.S. 375 (1966). Under Nevada statutory law, "[a] person may not be tried, adjudged to punishment or punished for a public offense while he is incompetent." 5 Nev. Rev. Stat. § 178.400(1).

⁷ See Section I.D. *infra*.

Riggins to ingest 800 milligrams of Mellaril each day of his trial was necessary to maintain his competence. None of the psychiatrists who testified believed it likely that Riggins would become incompetent without the medication. Indeed, only one psychiatrist who thought Riggins was competent while on Mellaril opined that there was even a "possibility" of Riggins becoming incompetent without the drug.⁸ The State's concern that Riggins "might become incompetent during trial" (R. 498) without Mellaril was too tenuous to justify depriving Riggins of the fundamental right to testify in his own defense.

Certainly, the State's concern that an unmedicated Riggins might "fake a psychosis" was not compelling. (R. 498-99). Recognition of this concern would permit the State to medicate defendants for the express purpose of altering their demeanor, even when medication would have no beneficial effect and is not necessary to maintain the defendant's competence. See *Geders v. United States*, 425 U.S. 80 (1976) (order prohibiting defendant from consulting his attorney during an overnight recess held unconstitutional because the State's interest in cross-examining a defendant without the risk of improper "coaching" does not outweigh defendant's right to the assistance and guidance of counsel). Similarly, the State's concern that if Riggins did become incompetent without medication, there might be "a two-month delay to get him back to the period of where he's competent" (R. 499) was frivolous. The hearing on Riggins' motion to terminate medication occurred four months before trial. See *Ballew v. Georgia*, 435 U.S. 223, 243-44 (1978) ("savings in

⁸ This lack of the evidence is discussed further in Point II *infra*.

court time and in financial costs" does not justify reducing juries to the unconstitutional level of five members).

Even when a State can advance a compelling interest to restrict a defendant's fundamental right to testify, the means chosen to achieve that interest must be the least restrictive available. In *Illinois v. Allen*, 397 U.S. 337 (1970), for example, the Court considered how a trial court may properly limit the defendant's fundamental right to be present in the courtroom at every stage of his trial. The Court held that the right to be present was not absolute and could be limited when a trial judge is confronted with an obstreperous defendant. The Court said that the judge could handle the obstreperous defendant in at least three constitutionally permissible ways: "(1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." *Id.* at 344.⁹ Not surprisingly, the Court found that the least acceptable of these alternatives would be binding and gagging the witness:

[E]ven to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort. . . . [I]t [is] possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant.

⁹ *Illinois v. Allen* is cited by way of analogy. There is no evidence, and the State has never contended, that an orderly trial would have been impossible if Riggins had not been medicated.

Id. (emphasis added); see also *Estelle v. Williams*, 425 U.S. 501, 504-05 (1976) (trying a person in prison garb denigrates presumption of innocence); *Geders*, 425 U.S. at 91 (holding that trial court should have found a way "to deal with the problem of possible improper influence on testimony of 'coaching' of a witness short of putting a barrier between a client and counsel").

There were less restrictive alternatives available to assure that Riggins was competent to stand trial. For example, Riggins' medication could have been stopped to see if, in fact, he would become incompetent. Defense counsel suggested this (R. 500), and there was plenty of time to give this option a chance. During the hearing on the motion to terminate medication, which occurred nearly four months before trial, Dr. Master told the trial judge that, at most, it would take three or four weeks after medication was stopped to see whether Riggins would become incompetent. (R. 419). Dr. O'Gorman said it would take only "ten to fourteen days." (R. 485). Even if Riggins had become incompetent, it would only have taken several weeks to restore his competency. (R. 418). Accordingly, there was no legitimate reason not to employ this alternative. As Justice Rose said in his concurring opinion:

A defendant's right to have the jury observe his actions and demeanor should not be prevented unless it is absolutely required. One way to determine if it is necessary would be to suspend the taking of the medication and observe the defendant's behavior. This was not done [but should have been done] with Riggins.

(J.A. 60).

In this case, mentally "shackling and gagging" Riggins was not the least restrictive means to accomplish the State's interest in assuring Riggins' competency to stand trial. If anything, it was the most intrusive and prejudicial means.

D. Riggins Was Denied his Right To Waive His Right To Be Tried While Competent

Although this Court has long recognized that the trial of an incompetent defendant violates due process, see *Pate v. Robinson*, 383 U.S. 375, 378 (1966), it has also recognized that a criminal defendant has the right to waive certain constitutional rights as long as the waiver is knowing and intelligent and made with adequate awareness of its consequences. *Brady v. United States*, 397 U.S. 742, 748 (1970). Thus, a defendant may waive his privilege against self-incrimination, *Miranda v. Arizona*, 384 U.S. 436 (1966), his right to counsel, *Faretta v. California*, 422 U.S. 806 (1975), and his right to be present at trial, *Taylor v. United States*, 414 U.S. 17, 19 (1973).

Waiver is generally permitted when it will allow the defendant to achieve a desired litigation end. For example, a defendant may plead guilty and waive his right to a jury trial in order to obtain a lesser sentence. *Santobello v. New York*, 404 U.S. 257 (1971).

A competent defendant's right to waive his right to be tried while competent should also be permitted based on his Sixth Amendment right "personally to manage and conduct his own defense in a criminal case." *Faretta*, 422 U.S. at 817 (quoting *United States v. Plattner*, 330 F.2d 271, 274 (2nd Cir. 1964)). In *Faretta*, the Court held that the

Sixth Amendment guarantees a criminal defendant the right to represent himself, even though the assistance of counsel usually enhances a defendant's chances of being acquitted. Because it is the "defendant, and not the lawyer or the State, [who] will bear the personal consequences of a conviction, [i]t is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage." *Id.* at 834. Waiver also should have been permitted out of the same respect for individual autonomy and freedom of choice that underlies a competent person's right to refuse "unwanted medical treatment." *Cruzan v. Director, Missouri Dep't of Health*, 110 S.Ct. 2841, 2851 (1990).

The insanity defendant has a strong interest in appearing at trial in an unmedicated condition, even if that means he will be tried while incompetent, because the most probative evidence of his mental state at the time of the offense is likely to be his unmedicated demeanor. "Permitting the insanity defendant to be tried in an unmedicated state effectuates his Sixth Amendment right to personally manage and present his own defense, promotes the State's and the defendant's interest in accuracy of adjudication by providing the jury with the most trustworthy picture of the defendant's mental state at the time of the crime, and maximizes the defendant's right to self-determination and personal autonomy, a hallmark of our legal system." *Fentiman, supra*, at 1157-58.

Although an insanity defendant who chooses to be tried without medication may undermine his ability to assist his lawyer, "his choice must be honored out of that respect for the individual which is the lifeblood of the law." *Faretta*, 422 U.S. at 834 (quoting *Illinois v. Allen*, 397

U.S. at 350-51 (Brennan, J. concurring)). Accordingly, a defendant who is competent to stand trial only when medicated should, when competent, be permitted to waive his right not to be tried while incompetent, as long as he understands the consequences of his waiver. *Commonwealth v. Louraine*, 453 N.E.2d 437, 444 n.13 (Mass. 1983); *State v. Hayes*, 389 A.2d 1379, 1382 (N.H. 1978); see generally Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. Rev. 921, 950-78 (1985); cf. *Cruzan*, 110 S.Ct. at 2852 (recognizing right of incompetent person to refuse unwanted medical treatment if, while competent, the person expressed desire not to receive such treatment).

Riggins was competent at the time he requested that his medication be discontinued. The evidence suggested that Riggins would have remained competent if his medication were stopped. However, even if his mental condition would have deteriorated without medication, he had a right to be tried in that condition: the entire purpose of his motion to terminate his medication was to enable him "to fully present evidence to the jury pertaining to his mental condition at the time of the alleged offense, *i.e.*, to permit the jury to observe him free from the effects of the powerful antipsychotic Mellaril." (J.A. 42). Riggins should have been permitted to waive his right to be tried while competent.

II.

FORCIBLY MEDICATING PETITIONER VIOLATED HIS RIGHT TO A FAIR TRIAL BECAUSE IT VIOLATED HIS DUE PROCESS RIGHT TO REFUSE MEDICATION

While this Court has never considered under what circumstances, if any, a person can be forcibly medicated during his criminal trial, it has recognized that a person's liberty interests in his bodily and mental integrity and in privacy are implicated when a State seeks to medicate him against his will.

The context of a criminal trial makes the otherwise applicable standards governing forced medication inapposite, because the interests at stake are so different and because an extensive body of jurisprudence already exists which mandates that a criminal defendant be given a fair opportunity to defend himself. More specifically, as set forth in Section I of this brief, the nature of the insanity defense should bar the State from forcibly medicating an insanity defendant, at least absent a clear showing of compelling need.

Even if the Court should decide to look to its precedent concerning forced medication in the civil context, the State failed, in this case, to make an adequate showing to meet any conceivably applicable standard governing the determination to medicate. Moreover, the trial court, by failing to find facts supporting any bases for medication, failed to accord Riggins a constitutionally adequate procedure to determine if forced medication was appropriate. These failures resulted in a violation of

Riggins' constitutionally protected liberty interest and consequently deprived him of fair trial.

A. Riggins Has Fundamental Liberty Interests In Not Being Compelled To Ingest Antipsychotic Drugs

The Court has often found state invasions into the body repugnant to the liberty interests protected by the Due Process Clause. *See, e.g., Rochin v. California*, 342 U.S. 165, 209-10 (1952) ("Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents . . . is bound to offend even hardened sensibilities"); *Winston v. Lee*, 470 U.S. 753, 759 (1985) ("A compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime"). Just last term, the Court held that competent individuals have "a constitutionally protected liberty interest in refusing unwanted medical treatment," regardless of whether their choices appear wise or foolish. *Cruzan v. Director, Missouri Dep't of Health*, 110 S.Ct. 2841, 2851 (1990). The Court recognized that "no right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* at 2846 (quoting *Union Pacific Ry. v. Botsford*, 141 U.S. 250, 252 (1891)).¹⁰ And in *Washington v. Harper*, 110 S. Ct. 1028,

¹⁰ The Nevada Supreme Court itself has also declared that the right of a competent individual to refuse medical treatment is a "fundamental right." *McKay v. Bergstedt*, 801 P.2d 617, 621 (Nev. 1990).

1036 (1990), the Court specifically recognized that, even when incarcerated, an individual has "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs."¹¹

In *Harper*, the Court held that, while in prison, a convicted criminal, although competent, may be involuntarily medicated with antipsychotic drugs if he is mentally ill, would pose a serious danger to himself or others without the drugs, and treatment with the drugs is medically appropriate. *Id.* at 1037 n.8, 1039-40. The Court explained that in the prison environment, where the State has well established "interests in prison safety and security," *id.* at 1037, a regulation that infringes a fundamental right need only be "reasonably related to legitimate penological interests." *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). But the Court held that the presence of

¹¹ In addition to Riggins' liberty interest in avoiding the unwanted antipsychotic drugs, forcing him to ingest mind-altering drugs also implicated his First Amendment interests. Antipsychotic drugs, such as Mellaril, are - as this Court has recognized - compounds that affect the mind, intellectual functions, perception and emotions. See *Mills v. Rogers*, 457 U.S. 291, 293 n.1 (1982); see also *Bee v. Greaves*, 744 F.2d 1387, 1394 (10th Cir. 1984) ("Antipsychotic drugs have the capacity to severely and even permanently affect an individual's ability to think and communicate."), *cert. denied*, 469 U.S. 1214 (1985). The primary effects of these drugs, including Mellaril, is to alter mental processes and emotions that play a part in the development and expression of ideas and beliefs. (R. 408). Freedom of expression would be bereft of meaning were the government readily able to alter, shape and control mental processes. See generally Winick, *The Right to Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. Miami L. Rev. 1, 58-59 (1989).

"ready alternatives" would be evidence that the prison regulation is not "reasonable." Moreover, the Court indicated that, outside the prison environment, the state's infringement of an individual's fundamental right to refuse unwanted medical treatment would be subject to the "rigorous standard of review" that ordinarily applies to infringements of fundamental rights. *Id.* at 1037-38. This is the standard that should have been applied in the instant case. Unlike *Harper*, who was a convicted criminal sentenced to prison, Riggins was merely a pre-trial detainee. As this Court held in *Bell v. Wolfish*, 441 U.S. 520, 545 (1979), "pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners."

Given the significant liberty interests at stake in the decision to medicate an insanity defendant at a trial where his life is at stake, the State interests that could justify medicating Riggins had to be more compelling than the interests that justified medicating *Harper*. Moreover, those interests could justify forced medication only if the medication was also medically necessary and appropriate and no "ready alternative" for achieving that interest was available. *Harper*, 110 S. Ct. at 1037 n.8, 1038.

The only interest advanced by the State in Riggins' case that could possibly have justified forcing Riggins to ingest huge dosages of Mellaril was ensuring that Riggins was competent for trial. Unlike in *Harper*, the State did not advance its interest in "prison safety or security" or contend that Riggins would be dangerous to himself or others without the medication. And, as discussed in Point I of this brief, the State's purported interests in avoiding a

minor delay of Riggins' trial or in preventing Riggins from "faking a psychosis" were insubstantial.

B. Due Process Required the State to Prove by Clear and Convincing Evidence That Medicating Riggins Was Necessary to Achieve a Compelling State Interest

Because of the gravity of the interests at stake when a State seeks to forcibly medicate an insanity defendant, due process requires a judicial hearing at which the state must prove by clear and convincing evidence that medication is necessary to achieve a compelling state interest.

"The function of the standard of proof . . . is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' " *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re: Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). The Court has required the "clear and convincing" standard "when the individual interests at stake in a State proceeding are both 'particularly important' and 'more substantial than mere loss of money.' " *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (quoting *Addington*, 441 U.S. at 424).

The liberty interests at stake when the State seeks to medicate a competent individual with antipsychotic drugs against his will are substantial, and are enhanced when the individual is an insanity defendant standing trial for a crime punishable by death. The defendant's interests in this context are of the utmost importance and should not be infringed absent "clear and convincing"

evidence that an infringement is necessary to achieve a compelling state interest.

The Court has required this standard of proof in the analogous context of civil commitment proceedings. In *Addington*, 441 U.S. at 433, the Court held that in a civil commitment proceeding a State must show clear and convincing evidence that its interest in commitment outweighs the individual's interest in continued liberty. The Court reasoned that in these proceedings, which threaten individuals with a substantial loss of liberty, the risk of an erroneous determination should fall on society. *Id.* at 427. The Court recognized the danger of making "psychological" determinations based on one or two instances of unusual conduct. "Increasing the burden of proof is one way to . . . perhaps reduce the chances that inappropriate commitments will be ordered." *Id.* If anything, the involuntary administration of antipsychotic drugs to a criminal defendant – and particularly to one who pleads insanity – for the purpose of making him competent to stand trial requires at least as high a standard as the one adopted in the civil context of *Addington*: "In the administration of criminal justice, our society imposes almost the entire risk of error upon itself." *Id.* at 424.

The defendant should not bear the consequences of an erroneous decision that medication is necessary to maintain his competency. As with civil commitment, absent a strict burden of proof, involuntary medication could occur on the basis of "a few isolated instances of unusual conduct" or on the basis of a single brief psychiatric examination. This threatened deprivation risks particularly severe consequences for an insanity defendant. For these reasons, a burden of proof greater than a "mere

preponderance" is necessary to protect the rights at stake: an individual should "not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the State." *Id.* at 427.

C. The Facts Presented Did not Support Compelled Medication Under Any Conceivably Applicable Standard

The only interest advanced by the State in this case that could conceivably have overcome Riggins' compelling liberty interests was the State's interest in rendering him competent for trial. The State failed to demonstrate by clear and convincing evidence – or, for that matter, by even a preponderance of evidence – that forcing Riggins to ingest 800 milligrams of Mellaril each day of his trial was necessary to achieve its interest. It also failed to show that a smaller dosage of Mellaril or some less intrusive therapy would not have been sufficient to maintain Riggins' competency.¹² See *United States v. Charters*, 829 F.2d 479, 493 (4th Cir. 1987), modified on rehearing, 863 F.2d 302 (4th Cir. 1988), *cert. denied*, 110 S. Ct. 1317 (1990); *Bee*, 744 F.2d at 1396.

¹² Before compelling a person to ingest antipsychotic drugs for any reason, the State must also establish that the medication is medically necessary and appropriate. See *Washington v. Harper*, 110 S. Ct. 1028, 1037 n.8, 1039-40 (1990). No such showing was made in this case. To the contrary, several of the psychiatrists questioned whether Riggins should be taking such heavy dosages of Mellaril. (See, e.g., R. 473-75 (Dr. O'Gorman)). Indeed, at trial, Dr. Master testified that "I would never prescribe Mellaril for Mr. Riggins as he is now." (R. 836; See also R. 836-38).

Three psychiatrists testified at the hearing to terminate medication, but none testified that he ever found Riggins to be incompetent. Dr. Quass, the prison psychiatrist who examined Riggins several times and who first prescribed Mellaril for him during his detention, testified: "Each time I have seen him [Riggins] I felt he would be competent to stand trial. . . . At the time he was started on Mellaril I considered him to be competent. He was not grossly psychotic at any time." (R. 443). Similarly, Dr. Master, who interviewed Riggins once in February 1988, stated that at that time – when Riggins was on nearly half the dosage of Mellaril that he was on at the time of trial – he found Riggins competent to stand trial. (R. 407). Finally, Dr. O'Gorman, who examined Riggins in March 1988 and who had treated him six years earlier, testified that he at no time viewed Riggins as an incompetent person. (R. 475).

Each psychiatrist also testified regarding what he considered the likely effects of stopping Riggins' medication. None stated that ceasing the medication would likely or probably cause Riggins to degenerate into an incompetent state. Dr. Quass testified that Riggins would be competent without medication. (R. 443). Dr. Master intimated that he had no idea how ceasing medication would affect Riggins: "It will have one of twelve different effects . . . [that] requires guessing the future." When persuaded to venture a guess, Dr. Master concluded: "My guess is that taking the patient – the defendant off of medication would have no noticeable effect," (R. 412) and would not render him incompetent. (R. 415). Finally, Dr. O'Gorman testified that he could not render an opinion as to the effects of taking Riggins off Mellaril. (R. 485).

In short, none of the three expert witnesses, who were the only witnesses at the hearing, offered any support for the State's contention that Riggins would become incompetent without medication. Their testimony, in fact, convincingly demonstrates the contrary – that Riggins was always a competent individual regardless of whether or not he was taking Mellaril. Only one psychiatrist "guessed" that it was even "possible" that Riggins would become incompetent. (R. 414). No evidence suggests, however, that the possibility was at all likely. Accordingly, this was not a case where the trial court had to assess the credibility of witnesses or the weight of evidence – there was simply no evidence supporting the State's position.¹³

¹³ Indeed, the State failed even to present evidence that would satisfy the *Washington v. Harper* test, which petitioner contends is inapposite in this context. *Harper* held that the Due Process Clause permits a State to medicate a convicted prisoner if the prisoner is dangerous to himself or others, and the treatment is in the prisoner's medical interest. *Harper*, 110 S. Ct. at 1037 n.8, 1039-40. Here, the State presented no evidence (because there was no evidence) that Riggins presented a danger to himself or others without medication. As discussed in note 12, *supra*, both Dr. O'Gorman and Dr. Master, the two court-appointed psychiatrists who testified for the State, questioned the necessity and the appropriateness of forcing Riggins to ingest 800 milligrams of Mellaril each day of his trial. (See R. 473-75, 836-38).

D. Due Process Required the Trial Court to Make Factual Findings on the Record

In light of the liberty interests at stake when an insanity defendant is medicated for trial, due process also requires the trial court to make specific factual findings on the record. Absent such findings, reviewing courts – such as this one – are handicapped in attempting to assess the manner in which a lower court reached its decision. The Federal Rules of Civil Procedure generally require federal trial courts in civil cases to "find the facts specifically and state separately their conclusions of law thereon." Fed. R. Civ. P. 52(a). Where the state seeks to force medication upon an insanity defendant who faces a potential death sentence, similar procedural protections are due.

The trial court's one-page order denying Riggins' motion to terminate medication (J.A. 49) made no finding of facts: it did not identify what State interest justified involuntary medication nor did it find that forcing Riggins to take 800 milligrams of Mellaril a day was medically necessary and appropriate. Indeed, the determination to medicate Riggins was made without reference to legal standards, without findings of any facts, and without reference to any burden of proof. It was, in fact, nothing more than a conclusory determination that in one judge's opinion, for unknown and unstated reasons, and based on unknown – and in this case, non-existent – evidence, the medication of Riggins should continue.¹⁴ Such a procedure does not comport with due

¹⁴ The trial court's failure to set forth findings of fact justifying medication stands in sharp contrast to the court's

(Continued on following page)

process where significant liberty interests, and ultimately a man's life, are at stake.

III.

THE COMPELLED MEDICATION VIOLATED PETITIONER'S RIGHT TO A FAIR SENTENCING DETERMINATION

The State's involuntary medication also unfairly prejudiced Riggins in his effort to persuade the jury not to impose the death penalty, in violation of the Eighth Amendment. By denying Riggins the opportunity to present crucial evidence of his mental illness – namely, his own testimony regarding his thought processes, and his natural demeanor and physical appearance – the State denied him the opportunity to present crucial mitigating evidence, at a proceeding when nothing less than his life was at stake.

As this Court has repeatedly held, the finality of the death penalty makes it qualitatively different from a sentence of imprisonment. "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); see also *Ford v. Wainwright*, 477 U.S. 399, 412 (1986) (need for guarding

(Continued from previous page)

disposition of Petitioner's motion to determine competency. In its order finding Riggins competent, the court set forth the evidence relied upon, and the specific factual finding that Riggins was "in possession of sufficient mental faculties to aid and assist counsel in his defense." (J.A. 13).

against error is "particularly acute" in procedure to determine prisoner's sanity for execution).

In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), a plurality of the Court recognized that in order to give meaning to the individualized sentencing requirement in capital cases, the sentencer must be permitted to consider, "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense." This approach was adopted by a majority of the Court in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). *Eddings* held that the Eighth Amendment required that a capital sentencing scheme not only permit the defendant to present any relevant mitigating evidence, but required the sentencer "to listen" to that evidence. *Id.* at 115 n.10.

Since *Lockett* and *Eddings*, the Court has not hesitated to reverse a defendant's death sentence where a trial court has precluded or prevented a defendant from presenting mitigating evidence. In *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986), for example, the Court unanimously reversed the petitioner's death sentence where the trial court excluded testimony relating to the petitioner's adjustment to prison. The Court held that the exclusion of this evidence "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." *Id.*

More recently, in *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989), the Court held that a Texas statute which limited the sentencer's discretion to decline to impose the death penalty despite the defendant's mental retardation and abused background violated the Eighth Amendment, because the jury was not provided with a vehicle for

expressing its "reasoned moral response" to the mitigating evidence. The Court found that *Lockett* and *Eddings* compelled a remand for resentencing, so that the Court "not risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* (quoting *Lockett*, 458 U.S. at 605). See also *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (remanding for resentencing where sentencer had been precluded from considering evidence relating to defendant's childhood and character).¹⁵

Thus, a long line of cases stand for the proposition that consideration of any relevant mitigating evidence is a "constitutionally indispensable part of the process of inflicting the penalty of death." *California v. Brown*, 479 U.S. 538, 541 (1987) (quoting *Woodson*, 428 U.S. at 304). That right was manifestly denied to David Riggins.

Riggins' most compelling mitigating evidence was that he suffers from a severe mental illness. Riggins sought to persuade the jury that his mental illness, at least in part, explained his actions at the time of the crime and should mitigate his punishment. (R. 935-36). Even if Riggins' mental illness did not render him legally insane at the time of the crime – which he contends it did – it certainly should have been considered to mitigate his

¹⁵ The importance of demeanor evidence in a capital case was highlighted in *State v. Murphy*, 355 P.2d 323 (Wash. 1960), where the court ordered a new trial for a defendant who had been sentenced to death after being tried in a drugged condition. The court reasoned that "the matter of the life or death of the accused may well depend upon the attitude, demeanor and appearance he presents to the members of the jury." *Id.* at 327.

culpability for the crime and weigh against the imposition of a death sentence. Because Riggins was precluded from presenting this evidence, the jury may well have believed that he was not mentally ill.

As discussed in Point I of this brief, the Mellaril made Riggins appear without remorse, uncaring, and rational. In addition, the effects of the Mellaril likely made Riggins unable to read a statement he had planned to read to the jury at the conclusion of the penalty phase of the trial. (R. 446-47). In this statement, Riggins said that he felt grief and remorse, that he regretted his actions, and that even under heavy sedation, he had trouble sleeping when he thought about the crime. (R. 951).¹⁶

The medication he was compelled to ingest dramatically altered Riggins' appearance before the jury. Instead of seeing a man who was concerned and nervous about his fate and remorseful for his actions, the jury was presented with a man who appeared cold, apathetic, and without remorse. No explanation or instruction could remedy this prejudice – and the Court did not even attempt to give one to the jury. Instead, the jury was left to sentence a man who was not the actual man before them, but a distortion of that man created for the express purpose of undermining his defense. Such a procedure can hardly be said to comport with the requirement of special reliability this Court has recognized as necessary for a procedure by which a State seeks to impose the

¹⁶ Riggins' statement was instead read to the jury by his counsel – an inadequate substitute for a defendant's personal expression of grief and remorse. (R. 951).

death penalty. David Riggins' death penalty must therefore be vacated.

CONCLUSION

The judgment of the Supreme Court of Nevada should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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